MAR 10 1972

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1158

THOMAS S. CROW and SAUL BROURMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on February 12, 1972.

Citations to Opinion Below

A Memorandum Order of the United States District Court for the Western District of Pennsylvania, filed May 25, 1970, denying petitioners' motion to dismiss and motion to suppress is printed in Appendix "A" hereto. The opinion of the United States Court of Appeals for the Third Circuit, filed January 10, 1972 and amended January 31,

1972, is printed in Appendix "B" hereto and is not yet reported in the official reports. The Order denying a petition for rehearing dated February 9, 1972 is printed in Appendix "C". The judgments of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court, dated February 12, 1972, is printed in Appendix "D".

Jurisdiction

The judgment of the Court of Appeals below, Appendix "B", was entered on January 10, 1972. Rehearing was sought and the petition for rehearing was denied on February 9, 1972 and judgment entered February 12, 1972. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented for Review

1. Whether this Court's decision in *United States v. William R. Marion and Samuel R. Kretch*, 40 Law Week 4092, decided December 20, 1971, and *Dickie v. Florida*, 398 U. S. 30, 90 S. Ct. 1564 (1970), have been misapplied, and that the respondent denied petitioners their Sixth Amendment rights to a speedy trial and their rights, under Rule 48 of the Federal Rules of Criminal Procedure, to criminal prosecution without unnecessary delay, where the indictment was not returned until fifty-five (55) months after the Securities and Exchange Commission began public administrative proceedings against petitioners; where the only two charges in a nine-count indictment upon which petitioners were convicted alleged to have occurred March 15, 1963 and the indictment was returned March 7, 1968, only a week before the statute of limitations would have run; where the indictment was not returned until twenty-two

(22) months after the formal recommendation of criminal prosecution was made to the Department of Justice and to the United States Attorney upon findings and conclusions which had been made forty-one (41) months previously by the Washington Regional Office of the Securities and Exchange Commission which recommended the criminal prosecution.

2. Does an administrative proceeding by the respondent, with attendant subpoena power, publicity, loss of employment, revocation of broker's license and making of findings of fact and conclusions of law which remained basically unchanged during the over twenty-two (22) months of investigation subsequent thereto result in delay in petitioner's speedy termination of respondent's accusations.

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the Fifth Amendment to the Constitution of the United States, due process of rights; Sixth Amendment to the Constitution of the United States, right to a speed trial, and Federal Rules of Criminal Procedure, Rule 48 (b).

Statement of Facts

In 1962 and until June, 1963, petitioners, Thomas C. Crow and Saul Brourman, were officers of the brokerage firm of Crow, Brourman & Chatkin, Inc. That firm, which was not a member of a stock exchange, dealt in the over-the-counter securities market. In January, 1963, the Securities and Exchange Commission (S. E. C.) began an administrative inspection of the operations of Crow, Brourman & Chatkin, Inc. During the course of its administrative in-

vestigation, whose purpose or nature was not divulged to petitioners herein, the S. E. C. inquired into, inspected and made copies of records, documents and transactions of certain securities, including Champion Industries, Inc., and obtained oral and written statements from said petitioners.

On April 22, 1963, by virtue of the information it had obtained from the aforesaid records, documents, transactions and statements, the S. E. C. issued a Formal Order of Investigation. The purpose of said Order was so it could be determined, through the formal investigatory process, whether or not violations of the Federal securities laws had occurred in the offer and sale of Champion Industries, Inc. and other securities.

On August 29, 1963, the S. E. C. issued an Order for Public Proceedings to determine, among other things, whether the anti-fraud provisions of the Federal securities laws in the offer and sale of Champion Industries, Inc. and other securities had been violated. The hearing began on November 19, 1963, and on June 1, 1964, the Division of Trading and Markets filed Proposed Findings of Fact and Conclusions of Law with the Hearing Examiner.

On October 29, 1964, the Washington Regional Office of the S. E. C. submitted to the S. E. C.'s Office of Criminal Reference in the Division of Trading and Markets a copy of the aforesaid Proposed Findings which had been filed with the Hearing Examiner on June 1, 1964, whose purpose was to recommend that a criminal prosecution be instituted and serve as a Criminal Reference Report.

On November 18, 1964, the Hearing Examiner filed his decision recommending revocation of the registration of Crow, Brourman & Chatkin, Inc., and finding petitioners herein to be causes of such revocation.

On March 9, 1966, the Washington Regional Office of the S. E. C. forwarded to the Office of Criminal Reference in the Division of Trading and Markets its formal Criminal Reference Report recommending criminal prosecution of petitioners herein, among others.

On March 15, 1966, the S. E. C. issued its Findings and Opinion, ordering the registration of Crow, Brourman & Chatkin, Inc. revoked and finding, among others, petitioners herein to be causes of that revocation.

On May 9, 1966, the S. E. C. ordered the referral of its files in the instant case to the Justice Department and to the United States Attorney for the Western District of Pennsylvania, with recommendations that certain individuals, including petitioners herein, be prosecuted for violations of the Federal securities law.

On March 7, 1968, a Federal Grand Jury returned the instant indictment.

On August 16, 1968, petitioners herein filed a Motion to Dismiss Indictments. The motion came on for hearing before the Honorable John L. Miller, United States District Judge, on January 26, 1970, who filed a Memorandum Order on March 25, 1970 denying such motion. Petitioners' appeal to the United States Court of Appeals for the Third Circuit was from this denial of petitioners' motion to dismiss.

Trial on said indictment was held before the Honorable Rabe F. Marsh from October 6, 1970 until November 7, 1970, when a verdict of guilty was found as to petitioners herein as to Counts 3 and 4 only. Petitioners were sentenced on February 12, 1971, and filed notices of appeal on February 22, 1971.

Reasons for Granting the Writ

Petitioners' defense to their conviction is the District Court's denial of their speedy trial rights under the Sixth Amendment, the prosecution's violation of Rule 48 (b) of the Federal Rules of Criminal Procedure, as well as the Fifth Amendment denying petitioners due process under the Constitution of the United States. The Circuit Court opinion relied on the recent case of *United States v. Marion*, 40 LW 4092, decided December 20, 1971, by this Court. Petitioners urge that the Circuit Court's reliance on *Marion* is misplaced because *Marion* explicitly states:

> "However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution."

In fact, a close reading of Marion reveals that your Honorable Court was concerned with post-indictment delays and the pre-accusation delays discussed in the opinion were really *obiter dicta*. Yet it is petitioners' defense that it was the respondent's pre-indictment, or pre-accusation delay, that is, the period from November 18, 1964, when revocation of the registration by the Securities and Exchange Commission was recommended, through March 7, 1968, when the indictment was first handed down, which prejudiced petitioners and was an unreasonably long period of time. The Circuit Court misapplied *Marion* when it attempted to shift the burden to the petitioners to show actual prejudice by reason of the unwarranted and unexplained delay on the part of the respondent. Surely the government, who investigates the alleged crimes and brings the indictment, is in control of all proceedings up until the time of indictment. Fundamental concepts of justice require that this move speedily unless, of course, the respondent,

not the petitioners, show, by convincing evidence, that the petitioners knew of the particular transactions of which they were to be subsequently indicted so they could assemble their witnesses and defense. Furthermore, Rule 48 (b) states there shall be no unreasonable delay in presenting the charge to the Grand Jury. Justice White, in *Marion, supra,* stated:

> "The motion rested on constitutional grounds exclusively, and neither the motion, the arguments of counsel, the Court's oral opinion or its judgment mentioned Rule 48 (b) Federal Rules of Criminal Procedure, as a ground for dismissal."

Footnote 4 then stated:

> "Rule 48 (b) provides that 'If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.' In any event, it is doubtful that Rule 48 (b) applies in the circumstances of this case, where the indictment was the first formal act in the criminal prosecution of these appellees. See cases cited in n. 11, *infra*."

In the *Marion case*, your Honorable Court held that Rule 48 (b) was not before the Court and that the decision was based on the Sixth Amendment defense. Nevertheless the opinion continued by discussing Rule 48 (b) as follows, 40 LW 4095:

> "No federal statute of general applicability has been enacted by Congress to enforce the speedy trial provision of the Sixth Amendment, but Rule 48 (b) of the Federal Rules of Criminal Procedure, which has the force of law, authorizes dismissal of an indictment, information or complaint '[i]f there is unreasonable delay in presenting the charge to a grand jury or in filing

> an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial . . .'. The rule clearly is limited to post-arrest situations."

Despite the *obiter dicta* of the *Marion case*, the Court of Appeals for the Third Circuit did not agree that Rule 48 (b) is limited to post-arrest situations. In footnote 2 to its opinion, on page 2, it is stated:

> "Were we to agree with Crow and Brourman, their convictions would, of necessity be reversed and they would be released."

This Court erred when it interpreted the plain words "unreasonable delay in presenting the charge to the grand jury or in filing an information against a defendant" to be limited to post-arrest situations. This cannot and should not become the law. You cannot have arrest without an information or indictment, yet the Rule speaks of unreasonable delay prior to presentation of charges or information. If this interpretation is permitted to be considered the law, it becomes a nullity because it emasculates its application to the majority of criminal cases in the federal judicial system. Justice White, in Part III of *Marion*, page 4096, stated:

> "We decline to extend the reach of the amendment to the period prior to arrest."

A literal reading of Rule 48 (b) would obviate the necessity of this Court's extending the reach of the Sixth Amendment to the period prior to arrest because Rule 48 (b) covers this period. In fact, Rule 48 (b) is the only rule which explicitly refers to pre-indictment and therefore necessarily pre-arrest delays in prosecution.

The concurring opinion of Mr. Justice Douglas in *United States v. Marion, supra,* cited precedent for the thesis that the individual charged, the defendant in a future criminal proceeding, could and would be an "accused" prior to a formal indictment. He wrote that undue delay may be as offensive to the right to a speedy trial before as after an indictment or information and stated, as petitioners now urge, that the anxiety and concern attendant on public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Footnotes 3 and 4 of the concurring opinion are illustrative of petitioner's position. It is elementary that until an actual indictment is brought the particular counts on which petitioners were accused were not known. The record clearly demonstrates that Crow, Brourman & Chatkin, Inc., the securities firm with which petitioners were associated, was a very active trading establishment and a fifty-five (55) month hiatus existed between investigation and indictment. Petitioners did not know until after indictment the particular transactions to which they were going to be held accountable, yet fifty-five (55) months later were expected to defend the actions of themselves and others in connection with isolated transactions. Petitioners submit this created a stale situation for the most knowledgeable defendant with the greatest memory.

The time element, put in its proper perspective, of unnecessary pre-indictment delay which the government had to prove and failed, was unavoidable, plus a literal reading of Rule 48 (b) are valid and substantial reasons for this

Court to grant certiorari on the issue of whether or not petitioners suffered unreasonable and prejudicial pre-indictment delay and then could not receive a speedy trial in accordance with their Constitutional guarantees.

Respectfully submitted,

JEROME M. LIBENSON,
HAROLD GONDELMAN,
Attorneys for Petitioners.

APPENDIX "A"

MEMORANDUM ORDER.

(Filed March 25, 1970.)

Defendants Abbott, Crow and Brourman, hereinafter referred to as defendants, filed motions to dismiss. Defendants Crow and Brourman have also filed a motion to suppress. Oral argument was had, testimony received and briefs have been filed. At the oral argument, we denied defendants' motion to suppress. Thus, only the defendants' motion to dismiss is passed upon in the present Memorandum Order.

Facts indicate that the indictment charges defendants with certain criminal violations of the securities laws allegedly occurring between May 1962, and June 1963. The indictment was issued on March 7, 1968. Defendants contend this delay has violated their Fifth and Sixth Amendment rights inasmuch as they have been denied a speedy trial which also results in a violation of due process.

The basic proposition is that the pre-arrest delay is protected by the guarantee of the Statute of Limitations which stymies the bringing of "overly stale criminal charges." *United States v. Ewell*, 383 U. S. 116, 122, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966). However, where there exists a deliberate, unjustifiable or unnecessary delay and the defendant is able to show that he was prejudiced by the delay, then a motion to dismiss is well founded. The defendants contention that mere delay is a presumption of prejudice is untenable. We do not find *United States v. Parrott*, 248 F. Supp. 196 (D. C. 1965), as standing for any such proposition. The facts in *Parrott* are far different from the present case inasmuch as the government in *Parrott* pursued a path of deliberate delay in proceeding on a civil matter to obtain information for the delayed criminal proceeding. We find that the substantial body of case law clearly indicates that the defendant must affirmatively demonstrate that the delay has prejudiced him. The rule is clearly set forth in *United States v. Feinberg*, 383 F. 2d 60 at 65 (2 Cir. 1967):

> "*Though prejudice is not to be presumed*, it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment . . . or a Sixth Amendment claim based upon the speedy trial guarantee, see United States v. Simmons, *supra*, 338 F. 2d at 806; United States v. Dickerson, *supra*, 347 F. 2d at 784. See also Chapman v. United States, 376 F. 2d 705 (2 Cir. 1967.)" (Emphasis added.)

In the hearing before us, the defendants presented no evidence of prejudice. Defendants offered that two possible witnesses have since died but they failed to demonstrate of what importance, if any, their testimony might

have been. The other evidence adduced fell far short of demonstrating prejudice. As a result, we must deny their motion to dismiss without prejudice to its renewal at the trial where they might be able to demonstrate prejudice from the delay.

ORDER.

And Now, to-wit, this 25 day of March, 1970, for the reasons set forth in the foregoing, the defendants' motion to dismiss is denied without prejudice to raise the same at the time of trial.

/s/ JOHN L. MILLER,
United States District Judge.

cc: Richard L. Thornburgh, Esq.,
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APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1292/3

UNITED STATES OF AMERICA,

v.

ALBERT N. DUKOW, WILLIAM J. ABBOTT, THOMAS S. CROW and SAUL BROURMAN,

THOMAS S. CROW,
Appellant in No. 71-1292.

SAUL BROURMAN,
Appellant in No. 71-1293.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued November 16, 1971.

Before: GANEY, ADAMS, and ROSENN, *Circuit Judges.*

OPINION OF THE COURT.

(Filed January 10, 1972.)

ADAMS, *Circuit Judge.*

Appellants, Crow and Brourman,[1] following a jury trial, were convicted on two counts of a nine count indictment

[1] The defendant Abbott was acquitted by the jury, and Dukow has appealed separately.

charging violations of various portions of the federal securities laws. While they do not complain that there was insufficient evidence to support the verdict or that there was reversible error in the course of the trial, Crow and Brourman argue that their motions to dismiss the indictment should have been granted because of a violation of F. R. Crim. P. 48(b), their Sixth Amendment right to a speedy trial, and their Fifth Amendment due process rights.[2]

Crow and Brourman were officers in the brokerage firm of Crow, Brourman and Chatkin, Inc. In January, 1963, the Securities and Exchange Commission (SEC) began a routine, administrative examination of the operations of the firm, inspecting and copying the records from a number of securities transactions. Based on the information obtained, the SEC, in April, 1963, issued a Formal Order of Investigation. Pursuant to the order, hearings were held. Appellants, although they were first warned of their rights, testified, and as a result of the hearing an order for public proceedings was issued on August 23, 1963. Additional hearings covering approximately 3,000 pages of transcript commenced on November 19, 1963 and led to the filing of proposed findings on June 1, 1964 by the SEC Division of Trading and Markets, and a decision by the Hearing Examiner on November 18, 1964 recommending that the brokerage firm's registration be revoked. On April 1, 1965 oral argument in the case was held before the SEC, which by order dated March 15, 1966, revoked the firm's license, finding that Crow and Brourman, among others, were the cause of the revocation.

[2] Were we to agree with Crow and Brourman, their convictions would, of necessity be reversed and they would be released.

During the three year period—from January, 1963 until March, 1966—the SEC considered criminal prosecution of Crow and Brourman with regard to the firm's stock transactions. Internal rules of the SEC required that prior to forwarding a file to the Department of Justice for the purpose of prosecution, the file should first be scrutinized by the SEC Office of Criminal Reference. The Washington Regional Office of the SEC initially communicated with the Office of Criminal Reference concerning this case on October 29, 1964. The Office of Criminal Reference decided that further investigation was necessary before criminal prosecution could be recommended to the Department of Justice. On March 6, 1966, an expanded report was sent to the Office of Criminal Reference. That Office on May 9, 1966, after review, decided to refer the file to the Department of Justice and the United States Attorney for the Western District of Pennsylvania. A Federal Grand Jury then indicted the defendants on March 7, 1968.

On August 16, 1968, Crow and Brourman moved to dismiss the indictments, and the motions were denied by Order dated March 25, 1970.[3] The trial commenced on October 6, 1970, and after almost five weeks of testimony, the jury rendered its verdict of guilty on Counts 3 and 4 of the indictment.

The delay complained of by Crow and Brourman, consists of either 55 months—the time from the initiation of public administrative proceedings by the SEC to the date of the indictment—or 22 months—the time from the referral of the case from SEC to the United States Attorney to the date of the indictment.

[3] No claim of unconstitutional delay is made concerning the time between indictment and trial and we, therefore, focus on the period between the commencement of the SEC investigation and indictment.

Before reaching the merits of the speedy trial argument, we must first determine whether any rights under the Sixth Amendment or F. R. Crim. P. 48(b) attach to a pre-indictment, pre-arrest delay—the only delay here in issue. In Ewell v. United States, 383 U. S. 116, 122 (1966), the Court noted that "the applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges." The Fifth Circuit has gone so far as to hold that "Any delay between commission of the crime and indictment is controlled by the applicable statute of limitations."

In the very recent case of United States v. Marion, 40 L. W. 4092 (Dec. 20, 1971), decided subsequent to the argument in this case, the Supreme Court stated, "In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event which occurred in this case only when the appellees [defendants] were indicted . . ." *Id.* at 4093. The Court then went on to hold that F. R. Crim. P. 48(b) also has no application until the accused has at least been arrested. *Id.* 4095. In light of this decision and *Ewell*, our inquiry on the speedy trial contention is at an end because the indictment in this case was handed down within the applicable period of limitations. Crow and Brourman are left, therefore, only with the contention that the delay was so long that their Fifth Amendment rights to due process were violated.

The test to be applied in determining whether Crow and Brourman's Fifth Amendment rights have been violated must now be considered. They forcefully advance the proposition that when the delay prior to indictment has been excessive, a *per se* infringement has occurred. They

argued that either the 55 months or the 22 months is excessive, and that the indictment should have been dismissed for this reason alone. The Supreme Court in United States v. Marion, *supra*, specifically refused to so extend the protection of the Fifth Amendment:

> "[T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial . . . ." 40 L. W. 4092 at 4097.

The sole question now, therefore, is whether Crow and Brourman have shown substantial prejudice. They argue that the deaths of two potential witnesses have caused them harm. However, no offer was made concerning the substance of the testimony which the two deceased persons would have proffered. One was the sales manager of the firm's Florida office and the other was a sales representative in the Pittsburgh office. No indication was given which showed that either of these individuals possessed any special knowledge of the transactions in question, and, in fact, during the trial, none of the surviving employees was called as a witness for the defense. Crow and Brourman, therefore, have failed to demonstrate substantial prejudice in this regard. Nor can they rely on dimmed memories to support their claim. United States v. Marion, *supra*, at 4097. Although six cartons filled with documents were turned over to the SEC in March, 1964, neither appellant asked for their return or for the right to inspect them. Moreover the transcript of testimony from the SEC public hearings was always available. Under these circumstances we cannot say that the District Court erred in finding that Crow and Brourman had not been prejudiced by the delay.

Accordingly, the District Court's denial of the motion to dismiss the indictment was not incorrect, and the judgments will be affirmed.

A True Copy:

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1292/3

UNITED STATES OF AMERICA,

v.

ALBERT N. DUKOW, WILLIAM J. ABBOTT, THOMAS S. CROW and SAUL BROURMAN,

THOMAS S. CROW,
Appellant in No. 71-1292,

SAUL BROURMAN,
Appellant in No. 71-1293.

Present: GANEY, ADAMS, and ROSENN, *Circuit Judges.*

ORDER AMENDING OPINION

It is ORDERED that the Opinion filed January 10, 1972 in the above-entitled cases be and hereby is amended by adding on Page 3, last line of the text before the footnote the following citation:

"Kroll v. United States, 433 F. 2d 1282, 1286 (5th Cir. 1970.)"

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Dated: January 31, 1972.

A True Copy:

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1292 and 71-1293

UNITED STATES OF AMERICA,

v.

ALBERT DUKOW, *et al.*,
THOMAS S. CROW,
Appellant in No. 71-1292,

SAUL BROURMAN,
Appellant in No. 71-1293.

SUR PETITION FOR REHEARING.

Present: Chief Judge Seitz, Judge Van Dusen, Judge Aldisert, Judge Adams, Judge Gibbons, Judge Rosenn, Judge Rosen, Judge Hunter.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

BY THE COURT,
ARLIN M. ADAMS,
Judge.

Dated: February 9, 1972.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1292 and 71-1293

UNITED STATES OF AMERICA,

v.

ALBERT N. DUKOW, WILLIAM J. ABBOTT,
THOMAS S. CROW, SAUL BROURMAN,

THOMAS S. CROW,
Appellant in No. 71-1292,

SAUL BROURMAN,
Appellant in No. 71-1293.

(D. C. Criminal No. 68-58.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY, ADAMS and ROSENN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed February 12, 1971, be, and the same are hereby affirmed

ATTEST:
(Signature illegible),
Clerk.

January 10, 1972

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No. 71-1158

In the Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS S. CROW AND SAUL BROURMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1158

THOMAS S. CROW AND SAUL BROURMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on counts 3 and 4 of a nine-count indictment, charging fraud in the sale of securities, in violation of 15 U.S.C. 77 (q)(a). Each was sentenced on count 3 to thirty days' imprisonment and a fine of $3,000 and on count 4 to a suspended sentence of imprisonment for two years and three years' probation. The court of appeals affirmed (Pet. App. B).

Petitioners' only contention is that they were denied their right to a speedy trial by reason of pre-indictment delay. In answer to this contention we rely upon the opinion of the court of appeals which carefully and correctly applied the holdings of *United States* v. *Marion*, 404 U.S. 307, to the facts of this similar case (Pet. App. B. 18).

The only matter not fully dealt with in the opinion below is the claim made here that the decision in *United States* v. *Marion* was *obiter dictum* insofar as it dealt with Rule 48(b), Fed.R.Crim.P., and is not controlling on that point (Pet. 6-10). This contention is without merit. The appellees in *Marion* contested the right of the government to appeal directly to this Court on the ground that the district judge had acted only in his discretionary capacity in sustaining the defense motion to dismiss the indictment for pre-indictment delay (Marion br. p. 9, Cratch br. pp. 2-3).

Dealing with the jurisdictional question, the Court pointed out that this was a shift of position by the appellees, 404 U.S. at 312:

> The motion rested on constitutional grounds exclusively, and neither the motion, the arguments of counsel, the Court's oral opinion, nor its judgment mentioned Rule 48(b), Federal Rules of Criminal Procedure, as a ground for dismissal. Our jurisdiction to hear this appeal has been satisfactorily established.

In addition to this jurisdictional argument, however, the appellees in *Marion* urged on the merits

that the district court's ruling was a ~~prior~~ after exercise of discretion under Rule 48(b) (Marion br. pp. 10-11, Cratch br. pp. 3-5). The Court answered these contentions in two footnotes, 404 U.S. 312 n.4, 319 n.11, indicating that the Rule was limited to post-arrest situations (404 U.S. at 319).

Moreover the language of Rule 48(b) is:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant *who has been held to answer to the district court*, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint. [Emphasis supplied.]

In *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (C.A. 6), cited in *Marion* at 319 n.11, the court in interpreting this language said:

> There was no unnecessary delay in the prosecution of the defendant after he had been held to answer. As to the delay from the time of the commission of the offense to the commencement of the criminal proceedings, that is controlled by the Statute of Limitations, which is not here in question.

This is the interpretation accepted in *Nickens* v. *United States*, 323 F. 2d 808, 809-810 (C.A. D.C.), certiorari denied, 379 U.S. 905; *Harlow* v. *United States*, 301 F. 2d 361, 366 (C.A. 5), certiorari denied, 371 U.S. 814, and *United States* v. *Hoffa*, 205 F.Supp. 710 (S.D. Fla.), all of which were cited by the court in *Marion*, 404 U.S. at 319 n.11. The dis-

cussion in *Marion* of Rule 48(b) is dispositive of this case.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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